



Office of the Attorney General

State of Texas

February 20, 1998

DAN MORALES

ATTORNEY GENERAL

The Honorable Keith Oakley
Chair, House Committee on Public Safety
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-012

Re: City's use of noncivil service personnel for
fire fighting duties at NASCAR race track
(ID# 39351)

Dear Representative Oakley:

You have advised us that the City of Fort Worth has built and owns a NASCAR¹ race track, and that the city intends to hire and station fire fighters in the pits and on the track to assist with fire-related emergencies during racing events. You ask whether Local Government Code chapter 143 requires the city to use civil service personnel for fire fighting duties at the race track, or whether the city may use noncivil service personnel. The City of Fort Worth, Office of the City Attorney, informs us on the other hand that the NASCAR race track is owned not by the city, but by a nonprofit development corporation formed pursuant to V.T.C.S. article 5190.6, section 4B.² The city states that the development corporation has leased the race track to Texas Motor Speedway, Inc., a private corporation. The private corporation, according to the city, hires the fire fighters stationed in the pits and on the race track.

In this opinion, we will not determine whether the city or the development corporation owns the race track, or which entity employs the fire fighting personnel stationed in the pits and on the race track. We perceive that there may be a factual question regarding ownership of the race track, or it may be your view that the employees of an article 5190.6 nonprofit development corporation and of the private company that leases and operates the corporation's facilities are city employees. This office does not resolve questions of fact, and you have not asked us to determine which entity employs the fire fighters as a matter of law. Therefore, we will answer the question posed to us: May the city hire noncivil service fire fighters at the NASCAR race track?³ To the extent that fire fighting personnel are employed by a private corporation, chapter 143 does not apply. See Local

¹NASCAR is the National Association for Stock Car Auto Racing.

²Article 5190.6 development corporations are entities authorized and created by the governing body of a city, county, or district for the purpose of promoting and developing new and expanded business enterprises. *Id.* § 3. The development corporation "act[s] on behalf of" the city, county, or district. *Id.* § 4(a).

³This office on occasion is presented with factual information that differs from the information presented to us by the opinion requestor. As we are not equipped to resolve questions of fact, it is our practice to note that factual issues exist and proceed to respond to the opinion request applying the facts set out by the requestor.

Gov't Code § 143.003(4) ("Fire fighter" means a member of a fire department . . ."); *cf. Aguilar v. City of El Paso*, 594 S.W.2d 191, 194 (Tex. Civ. App.--El Paso 1980, writ ref'd n.r.e.) (holding that employees of independent contractor engaged by city were not city employees entitled to civil service protection).

We assume from your letter that the City of Fort Worth has adopted the Fire Fighters' and Police Officers' Civil Service Act ("the act"), codified in chapter 143 of the Local Government Code. The act requires the city's governing body to provide by ordinance for the classification of all fire fighters and police officers. Local Gov't Code § 143.021. All fire fighters and police officers appointed to the fire department by the city must be placed within the protection of the civil service system.

A "fire fighter" for purposes of chapter 143 means "a member of a fire department who was appointed in substantial compliance with [chapter 143] or who is entitled to civil service status under Section 143.005⁴ or Section 143.084."⁵ Local Gov't Code § 143.003 (footnotes added). Chapter 143 requires applicants for appointment to beginning positions in the fire department to take and pass a competitive examination. A "fire fighter," therefore, "is a person who has passed an examination for fire-fighting work in the Fire Department and has made a high enough grade to be certified and has been certified as a fire [fighter]." *City of Wichita Falls v. Harris*, 532 S.W.2d 653, 657 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e.).

A city may not avoid placing fire fighters within the civil service system by not requiring them to take an examination in accordance with chapter 143, however. "If the Act is construed strictly it would mean that the City could employ new firemen who would not be under Civil Service by simply not giving them an examination. The City acknowledges that this is obviously not the intent of the legislature." *Id.* To give effect to the legislature's intent, courts look beyond section 143.003's definition of fire fighter to the act as a whole. *Id.*; *see also Lee v. City of Houston*, 807 S.W.2d 290, 292-94 (Tex. 1991) (citing *City of Wichita Falls v. Harris*).

The act provides that all vacancies or new positions in existing classifications must be filled from eligibility lists created as a result of examinations given qualified applicants. Local Gov't Code § 143.021(c). Applicants for beginning positions in the fire department must take and pass an examination "based on the person's knowledge of and qualifications for fire fighting and work in the fire department" and which "inquire[s] into the applicant's general education and mental ability." Local Gov't Code § 143.025(b). Any position that requires knowledge of fire fighting and work in the fire department falls within the civil service system, and any appointments to that position

⁴Section 143.005 provides that a fire fighter or police officer who is employed by a city when it adopts the Act does not have to take a competitive examination in order to remain in his or her position. Local Gov't Code § 143.005.

⁵Section 143.084 made certain temporary fire fighters and police officers full civil service employees.

must be made in compliance with chapter 143. See *Lee*, 807 S.W.2d at 294⁶; *International Ass'n of Firefighters Local 624 v. City of San Antonio*, 822 S.W.2d 122, 128-30 (Tex. App.--San Antonio 1991, writ denied); *Harris*, 532 S.W.2d at 657-58. If the duties of a particular position fall outside the scope of the act, a city may abolish the position as a classified one and hire civilians to fill the position, provided the city does so in good faith. *Lee*, 807 S.W.2d at 295 (citing *Moncrief v. Tate*, 593 S.W.2d 312 (Tex. 1980)). "As long as the position remains within the civil service system, however, any person holding the position is entitled to the full protection of the Act." *Id.*

You tell us that the city is considering "utilizing" volunteer fire fighters from neighboring communities for stand-by duty at the race track. We cannot determine from your letter whether the city intends to pay the normally volunteer fire fighters or whether the fire fighters will serve without compensation. We assume, however, that the stand-by fire fighters will be performing the same types of duties performed by classified city fire fighters, *i.e.*, duties that require knowledge of fire fighting and work in the fire department. Whether they are paid or unpaid, fire fighters appointed to the fire department by a civil service city must be appointed in compliance with chapter 143. A city may not circumvent the civil service statute by appointing volunteers to positions ordinarily filled by classified fire fighters. We conclude, therefore, that chapter 143 prohibits the City of Fort Worth from appointing noncivil service personnel to the fire department to perform fire fighting duties at the NASCAR race track.⁷

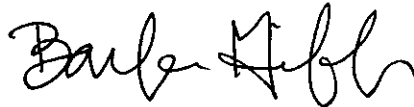
⁶Although *Lee* involved the classification of police officers, courts apply the same reasoning when considering the classification of fire fighters. See *International Ass'n of Firefighters Local 624 v. City of San Antonio*, 822 S.W.2d 122, 129 (Tex. App.--San Antonio 1991, writ denied).

⁷We do not address whether chapter 143 prohibits a civil service city from entering into an interlocal agreement with a paid or volunteer fire department from another jurisdiction to provide fire protection services to areas within the city's limits.

S U M M A R Y

All fire fighters appointed to a fire department by a city that has adopted chapter 143 of the Local Government Code must be placed within the protection of the city's civil service system. Any position that requires knowledge of "fire fighting and work in the fire department" falls within the civil service system, and any appointments to that position by the city must be made in compliance with chapter 143. Chapter 143 prohibits the City of Fort Worth from appointing noncivil service personnel to the fire department to perform fire fighting duties at the NASCAR race track.

Yours very truly,

A handwritten signature in black ink, appearing to read "Barbara Griffin", written in a cursive style.

Barbara Griffin
Assistant Attorney General
Opinion Committee